(1) Supreme Court, U.S.
FILED
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No.

In the
Supreme Court of the United States

October Term, 1998

CHARLES E. TILLMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner was improperly denied a Certificate of Appealability by the district court and Sixth Circuit Court of Appeals on the issue as to whether he was denied effective assistance of counsel at the trial and appellate levels for the failure to contest inaccurate and unreliable hearsay evidence which was used to raise his base offense level by two points for an Adjustment in his Role in the Offense and finding him to be an organizer, leader, and supervisor.

TABLE OF CONTENTS

Page

Statement of the Case and Facts 1

Reasons for Granting the Writ 2

Appendix A 6

Appendix B 9

Appendix C 10

Appendix D 15

OPINION BELOW

The Court of Appeals entered its judgement and opinion on February 3, 1999. A copy of that opinion affirming the judgement of conviction is attached as Appendix A.

JURISDICTION

Jurisdiction of this court is invoked under the provisions of 28 U.S.C. § 1254 (1), 28 U.S.C. § 2101(d) and Rule 20.1, Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner was denied his Sixth Amendment Right to effective counsel both at the trial and appellate level. Counsel in both instances failed to object to or challenge unreliable hearsay which was not supported or corroborated by extrinsic evidence. Said failure(s) resulted in an extensive increase in Petitioner's base offense level.

STATEMENT OF THE CASE AND FACTS

Petitioner was initially convicted of knowingly and intentionally possessing with intent to distribute approximately 4.26 grams of crack cocaine in violation of 21 U.S.C. 841 (a)(1) and (b)(1)(c) and 21 U.S.C. 841 (a)(1) for using and carrying firearms.

At his sentencing hearing April 22, 1992 the district court ruled that his base offense level was 32. The court converted $6.127.00 cash found in Petitioner's bedroom into drugs and 4.26 grams of crack cocaine. The court further determined pursuant to U.S.S.G. § 3B1.1(c) that Petitioner was a leader, organizer, or supervisor of a drug distribution network and increased his base level offense to 34 for a sentencing range of 188 to 235 months. The court imposed the maximum sentence of 235 under count one. Additionally, the court sentenced Petitioner to 70 months consecutive to count one for the violation in count two which totalled 305 months.

The Court of Appeals reversed and remanded as to count two and required the lower court to impose a 60 month sentence for the gun violation.

Petitioner subsequently filed a § 2255 Motion for Resentencing pursuant to *Bailey v. United States*, (1995) 116 S. Ct. 501, 133 L. Ed 2nd 472 and claims of ineffective assistance of counsel. The lower court vacated the 60 months sentence pursuant to *Bailey*, but found that Petitioner was subject to a two level enhancement for possession of firearms under U.S.S.G. § 2(D)1.1(b). The offense level increased to 36 for a sentencing range of 235 to 293 months, subject to a statutory maximum of 20 years.

Absent the adjustment for Role in the Offense, the total offense level is 36, leaving a sentencing range of 235 to 293 months.

Unfortunately, Petitioner was resentenced to 235 months. The lower court ignored Petitioner's claims of ineffective assistance of counsel. After sentencing the lower court issued a Certificate of Appealability, but limited inquiry to whether the two level increase under U.S.S.G. § 2(D)1.1(b) was valid.

Petitioner filed a Notice of Appeal and Request for a Certificate of Appealability on the issue of ineffective assistance of counsel. Petitioner argued that the failure of trial and appellate counsel to chal-

lenge evidence in support of the increase for Adjustment for Role in the offense under 3B1.1(c) allowed the lower court to rule that he was an organizer, leader, and supervisor.

The Sixth Circuit denied a Certificate of Appealability on the issue of ineffective assistance of counsel. On February 3, 1999 the Court of Appeals affirmed the lower court, citing *Pasquarille v. United States*, 130 F. 3rd 1220 (6th Cir. 1997).

Petitioner appeals to the United States Supreme Court, seeking a writ of Certiorari. Petitioner seeks a reversal of prior Orders denying a Certificate of Appealability on the issue of ineffective assistance of counsel. *Hohn v. United States*, (1998) 118 S.Ct. 1969.

REASONS FOR GRANTING THE WRIT

ISSUE TO BE DETERMINED

The Sentencing Court, without objection, determined Charles Tillman's base offense level to be 36. (Sentencing Hearing TR 102-104). He was erroneously given a two level increase for Adjustment for Role in the Offense pursuant to Section 3B1.1(c) of the Sentencing Guidelines which alleged that he was an organizer, leader, and supervisor. (Presentence Report, paragraph 34, Sentence Hearing, TR102). There was no reliable evidence to support this conclusion.

The failure of the defense, either at trial or upon direct appeal, to challenge the use of unreliable hearsay denied Tillman his Sixth Amendment Right to effective counsel. *Glenn v. Tate*, (6th Cir. 1995) 71 F. 3rd 1204. Had counsel objected, a different result surely would have been found by the sentencing court. *Strickland v. Washington*, (1984) 466 U.S. 668, 80 L. Ed 2nd 674, 104 S.Ct. 2052. Clearly, Tillman has shown cause and actual prejudice from the errors which he complains. *U.S. v. Frady* , (1982) 456 U.S. 152, 71 L. Ed 2nd 816, 102 S.Ct. 1584 reh. den. 456 U.S. 1001, 73 L. Ed 2nd 296, 102 S.Ct. 2287.

Tillman was indicted as a single defendant in count one for violating 21 U.S.C. 841(a)(1) and (b)(1)(c) possession with intent to distribute 4.26 grams of cocaine base and 21 U.S.C. 841(a)(1) for us-

ing and carrying firearms under count two. The Government's case was based upon the testimony of police officers who secured a search warrant and confiscated guns, drugs and cash from Tillman's home. (Rilet, TR 17-19, 23, 31, 35-42). There was neither a charge of conspiracy or evidence suggesting that Tillman worked in concert with other person(s).

In order to prevail in a two-level enhancement under U.S.S.G. § 3B1.1(c) the Government must prove the following:

> The defendant must have exercised some degree of control over others involved in the commission of the offense, or he must have been responsible for organizing others for the purpose of carrying out the crime. This requirement is implicit in the terms "organizer, leader, manager and supervisor," each of which suggest the presence of underlings or subordinates. *U.S. v Rowley* (8th Cir. 1992) 975 F. 2nd 1357

To substain its burden, the Government must provide proof at least of a preponderance of the evidence. *U.S. v. Herrera,* (6th Cir. 1991) 928 F. 2nd 769, 774; *U.S. v. Medina*, (6th Cir. 1993) 992 F. 2nd 573, 592. Furthermore, the Court failed to make express findings on this critical issue. *U.S. v. Lewis*, (6th Cir. 1995) 68 F. 3rd 987, 989; (Sentencing Hearing, TR 102-104).

Given the lack of findings by the Sentencing Court, it is difficult, at best to determine what evidence, if any, was relied upon to support this enhancement. The Government's main witness was Det. Medders, an Elyria policeman. His testimony was based primarily upon information gained from unreliable informants who had been arrested on other cases. (Medders, TR 26, 27, 29). In essence the Government utilized hearsay which was not supported by credible evidence and speculated that Tillman was a leader, organizer, or manager. (Sentencing Hearing, TR 90).

Section 6A1.3 of the Sentencing Guidelines does not restrict the court to information that would be admissible at trial but requires that it must have sufficient indicia of reliability to support its probable

accuracy. *U.S. v. Jones*, (8th Cir. 1993) 994 F. 2nd 456. "[A] defendant has a due process right to be sentenced upon information which is factually or materially correct." *United States v. Smith*, (5th Cir. 1994) 13 F. 3rd 860, 866. Further, "a defendant is entitled to be sentenced by accurate information; in other words, evidence evincing a sufficient amount of reliability to support its probable accuracy." *United States v. Atkinson*, (7th Cir. 1994) 15 F. 3rd 715, 720; *U.S. v. Mumford*, (7th Cir. 1994) 25 F. 3rd 461, 467. Federal Rule of Evid. 1101(d) 3 allows the use of hearsay evidence at sentencing. This rule, however, is not without qualification inasmuch that due process requires that such statements be corroborated by extrinsic evidence. *U.S. v. Ponce*, (9th Cir. 1995) 51 F. 3rd 820. Additionally, admissibility of hearsay is based on a finding that the evidence is sufficiently reliable. *U.S. v. Crockett*, (7th Cir. 1996) 82 F. 3rd 722, 727.

This hearsay evidence is also objectionable because it is not relevant to the charges herein. There is no evidence which connects the 4.26 grams of cocaine base to the generalized accusations by Det. Medders. Again, the failure of the Court to make findings makes it difficult to determine which evidence sustained the two level enhancement. In rejecting drug notes that formed the basis of an enhancement a reviewing Court found no evidence that the transactions were part of the "same course of conduct or common scheme or plan" *U.S. v. Duarte*, (7th Cir. 1991) 950 F. 2nd 1255, 1264. Certainly without evidence that inextricably ties gang information to the charges herein, it is not relevant and should be excluded. As it relates to U.S.S.G. § 3B1.1(c), the Sixth Circuit requires that the Government produce proof that person(s) are not merely directed by a defendant but culpable in the criminal enterprise under consideration. *U.S. v. Kotoch*, (6th Cir. 1992) 954 F. 2nd 340, 342; *U.S. v. Lewis*, (6th Cir. 1995) 68 F. 3rd 987, 189.

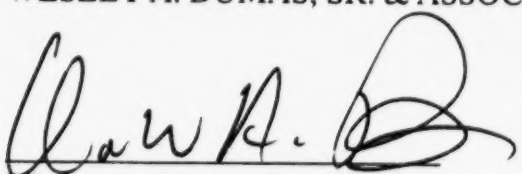
The net effect of granting this enhancement resulted in a two level increase to Tillman's base offense. Without the adjustment, Tillman's base offense level is 34, and subjects him to a much lower sentence of 188-235 months.

Clearly under the guidelines of *U.S. v. Frady*, supra, Tillman has demonstrated cause and actual prejudice.

Therefore, we respectfully pray that this Court grant a Certifi-

cate of Appealability for the cause herein.

Respectively submitted,
WESLEY A. DUMAS, SR. & ASSOC.



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APPENDIX A

JUDGMENT ORDER

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed February 3, 1999)

CHARLES E. TILLMAN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Case No. 97-4196

Before: MERRITT, GUY, and MOORE, Circuit Judges.

This is an appeal from a district court judgment granting in part and denying in part a motion to vacate sentence filed pursuant to 28 U.S.C. § 2255. This case has been referred to a panel of the court pursuant to Rule 34(j)(l), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In 1991, Charles Tillman was convicted after a jury trial of possession with intent to distribute crack cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C), and of using or carrying firearms during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c). The court sentenced Tillman to consecutive terms of 235 months and seventy months. Tillman was later given the same punishment in a resentencing procedure so that he could take a direct appeal to this court. The panel hearing the appeal affirmed the drug trafficking conviction but remanded for resentencing on the firearm issue as that sentence exceeded statutory boundaries by ten months. *United States v. Tillman*, No. 93-3620, 1994 WL 198165 (6th Cir. May 18, 1994) (per curiam). Tillman was sentenced on remand to an aggregate 295 month sentence.

In 1996, Tillman filed the present motion to vacate sentence in

which he raised various constitutional challenges to his drug and firearm convictions. The motion was denied as to all claims except for the challenge to the firearm conviction in reliance on *Bailey v. United States*, 516 U.S. 137 (1995). The court agreed that the firearms conviction should be vacated but then enhanced Tillman's base offense level in recognition of the firearm possession. The net term of imprisonment on the cocaine count, however, remained 235 months. This appeal followed. The Sixth Circuit recognized the only issue for appeal as follows.

> May a district court increase a base offense level for a possession of firearms pursuant to USSG §2D1.1(b) following a decision on a 28 U.S.C. § 2255 motion to vacate a conviction for using and carrying a firearm during and in relation to a drug trafficking offense pursuant to 17 U.S.C. § 924(c)?

Claims that the sentencing guidelines were applied in error are reviewed do novo for legal conclusions. *United States v. Scott*, 74 F.3d 107, 111 (6th Cir. 1996). This Court applies a clearly erroneous standard of review to the district court's factual findings with respect to the sentencing guidelines. *United States v. Watkins*, 994 F.2nd 1192, 1995 (6th Cir. 1993). An examination of the law reflects that the issue certified for review has been decided by another panel and that, in any event, the record supports the district court's decision to apply the enhancement.

Tillman was arrested when officers raided his apartment in 1991. The officers found crack cocaine, drug paraphernalia and an extensive firearm collection in the apartment. Officers stationed outside of Tillman's apartment immediately prior to the arrest testified they heard the sound of a shell being chambered into a shotgun coming from the apartment when Tillman became aware of his impending arrest.

As noted above, Tillman was initially found guilty of possession with intent to distribute crack cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C), and of using or carrying firearms during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c). The base offense level for the cocaine possession offense was not calculated with a firearm enhancement, owing to the substantive companion firearm conviction, and the court imposed a 235 month term of imprisonment.

After the § 924(c) conviction was vacated, however, the district court concluded from the record that the base offense level for the cocaine offense should be enhanced under USSG § 2D1.1(b)(1).

Section 2D1.1(b)(1) provides for a two point increase in the base offense level calculation of certain drug trafficking crimes if a defendant possessed a dangerous weapon during the commission of the crime. This is a tool for dealing with those who mix guns and drugs but whose conduct does not fall within 18 U.S.C. § 924(c)(1). *United States v. Elder*, 90 F.3rd 1110, 1133 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 529 (1996), and *cert. denied*, 117 S. Ct. 993 (1997). This enhancement is to be applied if the weapon was present during the commission of the offense unless it was "clearly improbable" that the firearm was connected to the offense. USSG § 2D1.1, comment. (n.3). The court concluded that Tillman's conduct fit this description, but the added offense level did not alter his 235 month sentence. The court took this action without giving Tillman a chance to object to the enhancement.

On appeal, Tillman was originally given permission to argue only the legality of the district court's decision to increase the base offense level without first affording Tillman a chance to contest the firearm enhancement. Tillman acknowledges that a subsequent Sixth Circuit decision made clear that a district court is in fact vested with the power to enhance a sentence under these circumstances without entering objections from the defendant. See *Pasquarille v. United States*, 130 F. 3rd 1220 (6th Cir. 1997). He nevertheless goes on in his brief to this court to argue the merits of the enhancement. The unrebutted testimony, however, shows that Tillman's conduct was completely deserving of the § 2D1.1(b)1) enhancement as one who "mixed guns and drugs." This appeal lacks merit under either analysis.

Accordingly, the district court's judgement is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

/s/ Circuit Judges Merritt, Guy and Moore

APPENDIX B

CHARLES E. TILLMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

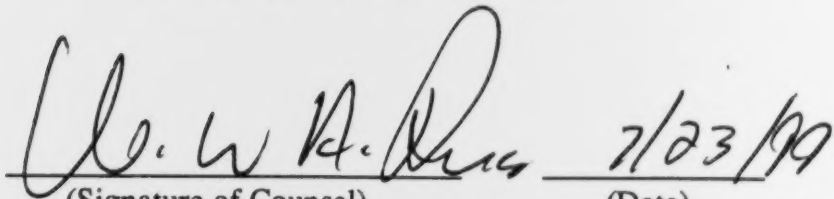
Pursuant to 6th Cir. R. 25, CHARLES E. TILLMAN
(Name of Party)
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation? no

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome? no

   If the answer is YES, list the identity of such corporation and the nature of the financial interest:



(Signature of Counsel) (Date)

Wesley A. Dumas, Sr.
Ohio Bar Reg. No. 0009004

APPENDIX C

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

United States District Court

NORTHERN District of OHIO

UNITED STATES OF AMERICA

v.

CHARLES E. TILLMAN

AMENDED JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number: 1:91CR0288

Wesley Dumas
Defendant's Attorney

Date of Original Judgment: 05/26/93
(or Date of Last Amended Judgment)

Reason for Amendment:

- ☐ Correction of Sentence on Remand (Fed. R. Crim. P. 35(a))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(c))
- Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36))
- ☐ Modification of Supervision Conditions (18 U.S.C. § 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant to ☐ 28 U.S.C. § 2255, ☐ 18 U.S.C. § 3559(c)(7), or ☐ Modification of Restitution Order

HE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC §841(a)(1) & (b)(1)(C)	Possession with intent to distribute crack cocaine	03/06/92	1

***(Defendant's Count two, (60 month consecutive sentence) conviction was vacated, pursuant to Bailey decision)

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 332-64-2855

Defendant's Date of Birth: 08/24/72

Defendant's USM No.: _____

Defendant's Residence Address:
(in federal custody)

Defendant's Mailing Address:
(in federal custody)

August 14, 1997
Date of Imposition of Judgment

Paul R. Matia
Signature of Judicial Officer

PAUL R. MATIA, United States District Judge
Name & Title of Judicial Officer

August 14, 1997
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 235 Months.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at _____ a.m./p.m. on _____.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on _____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

DEFENDANT: CHARLES E. TILLMAN
CASE NUMBER: 1:91CR0288-01

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Three (3) Years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: CHARLES E. TILLMAN
CASE NUMBER: 1:91CR0288

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): Court grants two-level enhancement in the offense level for possession of firearms, pursuant to U.S.S.G. §2S1.1(b).

Guideline Range Determined by the Court:

Total Offense Level: 36

Criminal History Category: III

Imprisonment Range: 235 to 240 months (statutory maximum)

Supervised Release Range: 3 to 5 years

Fine Range: $ 20,000 to $ 1,000,000

☒ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ _____

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

☐ For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

☐ The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following specific reason(s):

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHARLES TILLMAN

Petitioner

-vs-

UNITED STATES OF AMERICA

Respondent

Case No. 1:96CV2637

JUDGE PAUL R. MATIA

MEMORANDUM OF OPINION AND ORDER

Petitioner has filed a § 2255 motion seeking resentencing based on Bailey v. United States, ___ U.S. ___, 116 S. Ct. 501, 133 L.Ed.2d 472 (1995), and on other issues. His motion will be granted as to Bailey but denied as to all other issues.

The United States agrees that Bailey requires that petitioner's conviction and 60-month consecutive sentence for using and carrying firearms during and in relation to a drug trafficking offense be vacated. However, without the § 924(c) conviction petitioner is subject under the Sentencing Guidelines to a two-level increase in the offense level for possession of firearms. U.S.S.G. § 2 D1.1(b). The Sixth Circuit held in United States v. Clement, 86 F.3d 599 (1996), that application of the two-level firearm enhancement is proper upon reversal of a § 924(c) sentence on direct appeal, and this Court can see no good rea-

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[1] Petitioner apparently attempts to raise still another issue—converting cash into a comparable quantity of crack cocaine to determine the base offense level—in his Reply to Government's Response. This is totally improper and will not be considered by the Court. Furthermore, that issue was raised on appeal and was decided by the Court of Appeals adversely to petitioner.

[2] It appears the issue was discussed at the sentencing hearing, although no formal objection was made to the presentence report.

son why the same rule should not apply to a § 2255 resentencing. United States v. Hillary, 106 F.3d 1170 (4th Cir. 1997); United States v. Smith, 103 F.3d 531 (7th Cir. 1996).

With respect to the other issues raised by petitioner, the only one properly before the Court challenges a two-level enhancement in the offense. Since this is a nonconstitutional sentencing claim, it is procedurally barred by petitioner's failure to assert it on appeal.[2] And petitioner does not establish a valid claim of ineffective assistance of counsel, as he cannot show that the two-level enhancement was either clearly erroneous or a miscarriage of justice. There was more than enough evidence before the trial court to sustain its finding that petitioner was a leader; the court was entitled to consider all the evidence about petitioner, hearsay or not, so long as it was reliable.

For the foregoing reasons, the Court grants petitioner's motion to vacate his conviction and sentence on § 924 (c) and denies his motion in all other respects. The Court will schedule a hearing for resentencing and will order the preparation of a revised presentence report. The sole matter to be considered will be the two-level enhancement for possession of firearms; no other sentencing issues will be allowed.

The Court certifies that an appeal can be taken solely on the issue of enhancing the offense level after a Bailey vacation.

IT IS SO ORDERED.

/s/PAUL R. MATIA
UNITED STATES DISTRICT JUDGE